IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1508 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NATHUBHAI VIRJIBHAI VACHHANI

Versus

DAYALAL NATHUBHAI VACHHANI

Appearance:

MR SURESH M SHAH for appellants

MR PV HATHI for Respondent

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 21/01/2000

ORAL JUDGEMENT

This is a defendants' appeal against the judgment and decree dated 10th August 1981 passed by the Civil Judge (Senior Division), Gondal, in Special Civil Suit No.73 of 1976 whereby the suit of the plaintiff (respondent herein) for partition and separate possession in respect of Survey Nos.12/5, 12/6 and 3/5 was dismissed, but it was declared in favour of the plaintiff that he had got 1/5th share in the Survey Nos.1098, 1099 and 1100 situated in the village Bhayavadar and that he

is entitled to get the separate possession of his share from these lands and that for carrying out the partition and separate possession by metes and bounds, the copy of the decree be sent to the Collector, Rajkot to carry out the orders of the Court in terms of preliminary decree.

2. The plaintiff is one of the three sons of defendant no.1 Nathubhai Virjibhai Vachhani. Virjibhai, i.e. grandfather of the plaintiff and father of Nathubhai had three sons in all, including defendant no.1 Nathubhai. Defendants nos.2 and 3 are the other two sons of Nathubhai. Puriben who was initially arrayed as defendant no.4 in the suit was the real mother of the present plaintiff and since she had already expired, Sakariben was arrayed as defendant no.4 being the stepmother of the plaintiff. Defendant no.5 Lilaben is the unmarried daughter of Nathubhai who was also minor at the time when the suit was filed. Thus the parties are the members of Hindu Joint Undivided Family and they have got ancestral properties situated in village Bhayavadar, which are the subject matter of the suit. The suit properties consisted of agricultural lands bearing Survey Nos.1098 admeasuring 35 gunthas; Survey No.1099 admeasuring 4 acres and 5 gunthas; Survey No.1100 admeasuring 4 acres 28 gunthas; Survey No.12/6 admeasuring 1 acre 4 gunthas; and Survey No.12/6 admeasuring 1 acre 5 gunthas. It was also alleged that the defendant no.1 has also inherited 16 gunthas of Survey no.3/6 in the partition of the properties amongst his brothers. All the defendants are in possession of the joint family properties. The plaintiff has claimed 1/4th share in the suit properties; defendants are managing the affairs of the suit properties and that they are bound to give the accounts in respect of the produce out of the suit properties. The plaintiff is not ready to continue as a member of the Hindu Undivided Family and therefore, he is entitled to get his share separated from the properties. He gave a notice dated 5.7.1978 to the defendants, but the notice was returned as refused. Therefore, the plaintiff filed the present suit for partition and separate possession of his 1/4th share in the suit properties. The written statement at Exh.21 was filed on behalf of the defendants nos.1, 2 and 4. It was pleaded that the suit was bad for non-joinder and mis-joinder of the parties as the plaintiff had not joined other sisters as parties to the suit inasmuch as his sisters Dayaben, Kantaben and Savitaben had not been joined and he had only joined Lilaben as party to the suit. It was also pleaded that the suit properties were not the ancestral properties and further that the plaintiff had been separated from the family about 16 to

17 years ago and at that time he had been given his share. It was also pleaded that he was residing in separate house in Bhayavadar and the plaintiff had also purchased the land from Thakershi Raghav out of the amount given to him as share. That the plaintiff had sold away that land and since seven years, he was residing at Rajkot. On these pleadings, the suit was sought to be dismissed with costs.

3. On the basis of the pleadings of the parties, the trial Court framed the following issues:

(1) Whether the plaintiff's suit is bad for non-joinder of parties?

(2) Whether the plaintiff's suit is bad for mis-joinder of parties?

(3) Whether the suit properties are undivided joint Hindu family property?

(4) Whether the plaintiff has 1/4th share in the suit property?

(5) Whether the plaintiff has been separated on receiving his share, for about 16 to 17 years?

(6) Whether the plaintiff is entitled to partition of the joint family properties and to receive separate possession of his 1/4th share in the suit properties?

(7) Whether the plaintiff is entitled to mesne profit?

(9) What orders to be made?

The trial Court decided the issues nos.1 and 2 in favour of the plaintiff and against the defendants. With regard to issue no.3, it was held that the lands of Survey Nos.1098, 1099 and 1100 were ancestral undivided joint Hindu properties and for rest of the properties, it was held against the plaintiff. Regarding issue no.4, it was held that the plaintiff was having 1/5th share. The issue no.5 was also decided in favour of the plaintiff and against the defendants meaning thereby that he had not been separated with his share about 16 to 17 years ago. Issue no.6 was also decided in favour of the plaintiff to the extent of 1/5th of his share. The issue no.7 with regard to the mesne profits was also decided in

favour of the plaintiff and the order was passed accordingly.

4. In this appeal, learned Counsel argued on behalf of the appellants (defendants) on the question of mis-joinder and non-joinder of parties that the plaintiff had not arrayed the married sisters as parties, but this objection was given up by learned Counsel for the appellants during the course of arguments and he submitted that the plaintiff failed to implead the two of his uncles namely, Punja and Purshottam as parties and that they were necessary parties. It may be pointed out that so far as the non-joinder of Punja and Purshottam, i.e. uncles of the plaintiff is concerned, no such objection was taken before the trial Court. Besides this, here is a case in which it is clear on facts that the plaintiff is claiming his share only out of that ancestral property which has devolved upon his father Nathubhai i.e. defendant no.1, i.e. appellant no.1 herein and therefore, there is no question of impleading Punja and Purshottam as parties who have nothing to do with the share of the property which is devolved upon Nathubhai from their father Virjibhai. The plaintiff is not claiming any share out of any properties which may have gone to the uncles Punja and Purshottam. In this view of the matter, the objection of non-joinder of Punja and Purshottam is of no consequence. Even otherwise, so far as the partition suits are concerned, as per Hindu Law, only heads of all branches, females who are entitled to a share on partition and the purchaser of a portion of the plaintiff's share, the plaintiff himself being a co-parcener and if the plaintiff himself is a purchaser from a co-parcener, his alienor are necessary parties and others are only proper parties. In this case, the plaintiff while claiming his share out of the property which devolved upon his father from his grandfather, has impleaded his two brothers, the stepmother and the unmarried sister as defendants along with his father and therefore, the suit does not suffer from the infirmity of mis-joinder or non-joinder of the parties and the objection is not at all fatal, the suit could not be dismissed on this ground. In the ultimate analysis, the issue nos.1 and 2 are found to have been rightly decided in favour of the plaintiff and against the defendants.

5. So far as the third issue is concerned, it is found that the only witnesses who have been examined in this case are the plaintiff and the defendant no.1. In the instant case, it is found that there is no dispute about the ancestral properties which were situated in village Rabarika. The defendant no.1 has clearly

admitted in the cross-examination that the properties of Bhayavadar came to his share out of the ancestral properties. He has also given the Survey Numbers of these properties as Survey Nos.1098, 1099 and 1100 and it has been stated by him that these lands were purchased by his father Virjibhai through a registered sale deed on 12th March 1928 and the same had come to his share as against the other brothers. It is also clearly made out from the statements of defendant no.1 dated 26th June 1981 that his father Virjibhai had expired about 30 to 40 years back and further that the partition of his father's property had taken place and he had the properties which devolved upon him from his father, i.e. Survey Nos.1098, 1099 and 1100. Learned Counsel for the appellants have harped upon one sentence uttered by the plaintiff in his statement dated 18th February 1981 wherein in the cross-examination he has stated that there was no property at his grandfather's time at Bhayavadar. There appears to be some inaccuracy in the matter of recording this part because immediately after that, he has stated that the house situated at Bhayavadar is not of his grandfather's time and the properties of Bhayavadar are ancestral and they had come to his father's share. In any case, there is sufficient evidence and material on record to hold that the lands of Survey Nos.1098, 1099 and 1100 had been purchased by the plaintiff's grandfather Virjibhai and the same had come to the share of the plaintiff's father Nathubhai and therefore, the plaintiff was entitled to his share according to the Hindu Law out of these lands as the same were ancestral undivided joint Hindu family properties.

6. In the facts of this case, it is also made out that the appellant no.1 (defendant no.1 Nathubhai) has three sons including the plaintiff and the wife Sakariben and therefore, the plaintiff cannot claim 1/4th share in the suit property and can only claim 1/5th of the share according to law and the trial Court has rightly found the plaintiff to be entitled to 1/5th share. Whereas the trial Court itself has dismissed the suit with regard to the lands of Survey Nos.12/5, 12/6 and 3/5 and there is no cross-objection on behalf of the plaintiff against this decision, the scope of this appeal is confined only to the ancestral lands of Survey Nos.1098, 1099 and 1100 and the plaintiff's entitlement to 1/5th share out of these properties. In this regard, a reference was also made to certain revenue records to show that the name of Punja was there. In these entries in the revenue records, even if the name of Punja was there at some stage, it has been submitted on behalf of the plaintiff by Mr.P.V.Hathi that the name of Punja, i.e. a brother

of Nathubhai, it may have been there in order to save the objection of fragmentation, but in view of the clear admission by the defendant no.1 himself in his statement that all these lands had delved upon him from his father, the lands of Survey Nos.1098, 1099 and 1100 certainly became available as ancestral properties for the purpose of determining the share of the present plaintiff and the partition accordingly. In this view of the matter, the trial Court has not committed any error in coming to the conclusion that the lands of Survey Nos.11098, 1099 and 1100 are available for partition in the instant case as ancestral properties for determination of the share of the plaintiff and partition accordingly.

7. Except oral statement, no evidence of contemporaneous nature was led on behalf of the defendants to show that the plaintiff had been given a share out of these properties at the time when he separated about 16 to 17 years ago and merely on the basis of the oral statements that a sum of Rs.5,000/along with some kits was given to the plaintiff at the time when he was separated and that thus he was given his share in the ancestral properties cannot be taken to be correct and sufficient so as to hold that the plaintiff had already got his share out of these ancestral properties and therefore, it cannot be held that the plaintiff had been separated with his share. His mother had died and may be that he had separated after the coming of step-mother - but that by itself is no ground to say that he stood separated with his share. No father should bury the rights of his son with his mother's coffin and such rights of a son bereaved of his mother can't be made to extinct or extinguish either with the death of his mother or with the coming of the step-mother, if father remarrys. It is certainly a case of dismal denial of the due claim of a son by his father without any just reason.

8. As a consequence of the findings on issues nos.3, 4 and 5, it is clear that the plaintiff has been rightly held to be entitled to receive the separate possession of 1/5th of his share out of the suit properties to the extent of lands Survey Nos. 1098, 1099 and 1100 of village Bhayavadar. Thus, this Court finds that the findings arrived at by the trial Court do not suffer from any infirmity either of fact or of law and the plaintiff has to be held entitled to mesne profits accordingly.

9. This Court also finds that the plaintiff (respondent) had moved a Civil Application No.3947 of 1994 in this appeal seeking interim direction/order to

deposit mesne profits and on this application, the Court had passed the following order:

"F.A. 1508/81 to be placed on final hearing board which would be operative from September 1996. In case the First Appeal is not disposed of by 30th September 1996, the present opponent shall deposit in this Court a sum of Rs.1000/- per month w.e.f. the month of October 1996. This application is accordingly disposed of with no order as to costs.

24.6.96 (Y.B. Bhatt, J.)"

None of the parties are in a position to make any statement as to whether such amount of Rs.1,000/- per month has been deposited or not in terms of this Court's order by the opponents of Civil Application meaning thereby the defendants in the suit, i.e. appellants herein. In this view of the matter, it is ordered that at the time when the final decree is drawn and the accounts are taken, this order dated 24th June 1996 passed in Civil Application No. 3947 of 1994 shall also be kept in view and the decree shall be drawn accordingly. This First Appeal has no merits and the same is hereby dismissed with costs.

******

Sreeram.